

1           A    October 1, yes.

2           Q    That's after Comcast has tiered  
3   the NFL Network?

4           A    That is correct, it is after  
5   Comcast has tiered the NFL Network.

6           Q    Does this indicate to you, and I'm  
7   looking specifically at the part that Mr.  
8   Burke did not read to you, in the second email  
9   from the bottom which says, I continue to go  
10   back and forth with them. The sentence ends,  
11   they want the right to move us up in the  
12   sports tier, since they mainly compete with  
13   Comcast.

14           Does that indicate to you that  
15   Comcast is a large cable carrier that is  
16   actually hurting the NFL Network in its  
17   dealings with WOW as a smaller cable carrier  
18   by steering decisions.

19           MR. CARROLL:  Objection, leading.

20           JUDGE SIPPEL:  Well, that is  
21   leading. That is leading. Ask him like what  
22   economic significance.

1 BY MR. SCHMIDT:

2 Q Do you draw anything from that

3 last clause I read you?

4 A Let me try to put it in economic

5 terms.

6 JUDGE SIPPEL: You're got 417 in

7 front of you.

8 THE WITNESS: I don't think you

9 do. He's having me read from the top.

10 MR. SCHMIDT: No, from the last

11 sentence - the last clause in fact of the

12 second email from the bottom that reads, they

13 want the right to move us to the sports tier

14 since they mainly compete versus Comcast.

15 THE WITNESS: So this is my

16 economic interpretation is that WOW competes

17 directly against Comcast. So if Comcast

18 decides not to carry the NFL Network, that

19 decreases the incentives, all things being

20 equal, of WOW to carry the NFL Network,

21 because now it doesn't have to worry about

22 losing any customers to Comcast for that

1 reason.

2 BY MR. SCHMIDT:

3 Q What is the effect on the NFL  
4 Network?

5 A It's a double pain, I guess. So  
6 now you are not only losing it to Comcast, but  
7 you are losing it with WOW as well.

8 MR. SCHMIDT: I have nothing  
9 further. Thank you, Dr. Singer.

10 MR. BURKE: Two additional follow  
11 up cross questions.

12 FURTHER CROSS-EXAMINATION

13 BY MR. BURKE:

14 Q Dr. Singer, you said that DIRECTV  
15 faces the same competitive environment as  
16 Comcast; do you recall that?

17 A Well, certainly, I want to be  
18 fair, in areas - there are areas of the  
19 country that DIRECTV hits, like the - that  
20 Comcast doesn't. But in Comcast territories  
21 they certainly face the -

22 Q In fact they face wildly different

1 competitive circumstances than Comcast does in  
2 all kinds of regions throughout the country  
3 where Comcast isn't present.

4 A So I would disagree with your  
5 first characterization. They serve 32  
6 football markets, NFL football markets, and  
7 Comcast serves 19. To me that is a lot closer  
8 comparison than using, as you do, the poster  
9 child of Bright House who serves one NFL  
10 market.

11 Q And so but the fact is that  
12 DIRECTV is ubiquitous, EchoStar is ubiquitous,  
13 they face all kinds of competitive  
14 circumstances in areas where Comcast doesn't  
15 compete, isn't that right?

16 A Well, they serve areas that  
17 Comcast does not compete; that's correct.

18 Q And in addition there are  
19 circumstances - what cable companies serve the  
20 New York area?

21 A I believe Time Warner.

22 Q And isn't it true that CableVision

1     also serves the New York area?

2           A    I think so. I think so.

3           Q    And isn't it also true that

4   Comcast serves the New York DMA in north

5   Jersey?

6           A    I'll take your word at it, but I

7   don't have those facts.

8           Q    so those are three cable companies

9   that serve a very similar geographic area;

10  isn't that right?

11          A    One geographic area of the

12  country, correct.

13          Q    And we could go through a lot of

14  other lists as well, Dr. Singer. Isn't it

15  true that lots of cable companies serve

16  adjacent areas, and face very similar

17  demographic and other cultural circumstances

18  when they serve adjacent areas?

19          A    If two cable companies serve

20  adjacent areas, they face similar demand, I'll

21  grant you that.

22          Q    And in fact, if Comcast and Time

1 Warner are serving New York, they share a  
2 commonality of experience with respect to New  
3 York that is much greater than the commonality  
4 between DIRECTV and Comcast with respect to,  
5 say, Los Angeles, where Comcast has no  
6 operations, right?

7 A You lost me on that one. You want  
8 me to compare Comcast and Time Warner in New  
9 York to Comcast and DIRECTV in Los Angeles?

10 Q Right.

11 A Right, so in New York I grant you  
12 that Comcast and Time Warner are facing -  
13 well, of course DIRECTV is even closer in New  
14 York than Time Warner, because it actually  
15 serves the same geographic area. But relative  
16 to Los Angeles, I'll also grant you that  
17 Comcast is not there.

18 Q In the Massing case -

19 JUDGE SIPPEL: Finish your  
20 sentence. Comcast is not there and what?

21 THE WITNESS: I think the idea is  
22 that if you pick a geographic market that

1 Comcast doesn't serve, can you use DIRECTV's  
2 demand that it faces in that market as a proxy  
3 for Comcast demand for that market, and the  
4 answer is no. I grant you that.

5 BY MR. SCHMIDT:

6 Q And the Massie case that you  
7 referred to, in that case you said that the  
8 judge looked to in-region rivals of Comcast,  
9 is that right - or rather of Time Warner?

10 A Correct.

11 Q But the judge also looked to the  
12 adjacent cable companies like Charter and  
13 MediaCom, didn't he?

14 A My recollection from the order is  
15 that he rejected - he rejected Time Warner's  
16 insistence for the judge to avert his eyes  
17 from the carriage decisions of DIRECTV and  
18 EchoStar, because allegedly those guys had  
19 different business models. And the judge  
20 said, no, the in-region rivals are the most  
21 important ones. And in fact I quote that  
22 sentence back in my testimony.

1           Q    But he did look when doing the  
2   price analysis for example at both Charter and  
3   MediaCom, didn't he? As well as the in-region  
4   rivals?

5           A    He only looked - he followed my  
6   advice on the phase two, and he looked at only  
7   those contracts between third party payers,  
8   actual contracts. So to the extent that these  
9   cable guys that you are citing have entered  
10  into an agreement with Massing, he would have  
11  looked at those, yes.

12          Q    And you were involved in this  
13  case. He did look at those, didn't he?

14          A    I can't remember all the contracts  
15  that Massing had, but I'll take your word for  
16  it that they had contracts with those adjacent  
17  cable operators.

18          Q    Okay.

19               MR. SCHMIDT: Nothing else, Your  
20  Honor.

21               JUDGE SIPPEL: That's it?

22               Mr. Schonman, thank you, sir.



1           MR. SCHONMAN: I'm sorry to hold  
2   you up.

3           JUDGE SIPPEL: You are not  
4   holding anyone up.

5           MR. SCHONMAN: I know everyone is  
6   getting hungry for lunch.

7           Dr. Singer, my name is Gary  
8   Schonman, I am co-counsel for the Enforcement  
9   Bureau. And you will have to excuse some of  
10   my questions. They are probably going to be  
11   rather basic.

12          But I have trouble balancing a  
13   checkbook, much less understanding Ph.D.  
14   economics.

15          There was some discussion earlier  
16   about housing and crabs. And I think the  
17   discussion by and large focused on why people  
18   did not purchase certain items. And is it  
19   fair to say from your experience and your  
20   expertise that a price is not necessarily the  
21   only criteria for deciding not to buy  
22   something like a house?

1 THE WITNESS: Price is not the  
2 only factor that goes into a housing decision,  
3 that is correct.

4 MR. SCHONMAN: Might be the wrong  
5 size house?

6 THE WITNESS: Might be the wrong  
7 neighborhood.

8 MR. SCHONMAN: Crabs might be the  
9 wrong size crabs? Not hungry enough?

10 THE WITNESS: Sure.

11 CROSS-EXAMINATION BY COUNSEL FOR THE FCC

12 BY MR. SCHONMAN:

13 Q Okay. With regard to the chart  
14 which is Enterprise Exhibit 192, there was  
15 some discussion earlier about carriers, MVPDs  
16 that did not - that do not carry the NFL  
17 Network. Do you have any - are you able to  
18 conclude why those companies do not - why  
19 those companies decided not to carry the NFL  
20 Network?

21 A I can't pin it down. I can offer  
22 theories that are consistent with their

1 decision not to carry it.

2 Q Do you have any personal knowledge  
3 as to why the companies decided not to carry  
4 the NFL Network?

5 A Personal knowledge, beyond what  
6 I've read say in Paul Tagliabue's declaration,  
7 have I interviewed Time Warner and asked them?

8 Q Correct.

9 JUDGE SIPPEL: When you say his  
10 declaration, you mean his testimony?

11 THE WITNESS: His deposition  
12 testimony.

13 JUDGE SIPPEL: Okay.

14 BY MR. SCHONMAN:

15 Q Just a general question: do you  
16 have any personal knowledge as to why the  
17 various companies that do not carry the NFL  
18 Network decided not to carry the NFL Network?

19 A If by person you mean, did I  
20 interview them, I did not.

21 Q Correct. As an economist, can you  
22 make any observations, any inferences, for why

1 these companies may have decided not to carry  
2 the NFL Network?

3 A Sure.

4 Q And what would those inferences  
5 be?

6 A I can think of two that are vying  
7 in my mind anyway as candidates. One is pro-  
8 competitive, and the other is anti-  
9 competitive.

10 The pro-competitive one is that  
11 whatever price they were - whatever price NFL  
12 was ultimately willing to grant them at the  
13 end of the negotiation exceeded their  
14 willingness to pay. That is one possibility.

15 Q What are others? Any others?

16 A Yeah, there is an important other  
17 one that I keep putting out there based on my  
18 reading of Paul Tagliabue's deposition, and  
19 the reason why it struck me is that it was  
20 consistent with all this indirect evidence  
21 that I was bringing forward in the economics  
22 literature about how cable operators make

1     their decision vis-a-vis independent networks,  
2     jointly.

3             What I read Paul Tagliabue - he is  
4     the former commissioner of the NFL - when I  
5     read his deposition, what strikes me is when  
6     he says that Brian Roberts, who is the CEO of  
7     Comcast, when he issues the threat, he doesn't  
8     say if you don't give me the games exclusive  
9     on Versus then I'm going to tier you. He says  
10    that the cable industry is going to get you;  
11    cable industry is going to get you.

12            And then later on in the  
13    deposition Mr. Tagliabue says that Comcast has  
14    special relations with Time Warner, and they  
15    can use them to do good things and they can  
16    use them to do bad things.

17            So that and not by itself that in  
18    conjunction with all the other evidence that  
19    is out there that the vertically integrated  
20    cable operators make carriage decisions  
21    jointly as opposed to independently, caused in  
22    my mind a viable alternative hypothesis as to

1     why Time Warner is not carrying NFL Network.

2             Now despite all that, despite -

3             JUDGE SIPPEL: You didn't finish

4     before. What would it be?

5             THE WITNESS: The thought is that

6     - the conclusion is that if you take Paul

7     Tagliabue, is that when Comcast couldn't get

8     the exclusive rights, that they were trying to

9     say, they wanted the eight game package as

10    part of Versus exclusively so that Comcast

11    could sell it to other MVPDs; that's what the

12    fight was about.

13            And when NFL decided no, I'm not

14    going to give you the rights exclusively. I'm

15    going to carry my own network, and I'm going

16    to broadcast those rights on my own network,

17    called the NFL Network, the threat came back

18    was, the cable industry is going to get you.

19    It wasn't, Comcast is going to retaliate.

20    It's the cable industry is going to get you.

21    And just to follow the logic is that Comcast

22    called up Time Warner. If you follow all the

1 logical steps, and said, guys, we need to ice  
2 out the NFL for that decision.

3 Now setting that aside, okay, I  
4 still consider Time Warner's carriage  
5 decision. I don't want to close my eyes to  
6 Time Warner's decision, despite all that  
7 evidence suggesting that this decision was  
8 made jointly with Comcast. I say, you know  
9 what, set that aside; let's just calculate a  
10 fair market penetration test. And give Time  
11 Warner its weight, its weight is by the number  
12 of subscribers that he has. And then market  
13 penetration test it. And I still find that  
14 over half the MVPDs, when stated on a  
15 weighted, on a subscriber weighted basis,  
16 carry the NFL Network.

17 So I don't want to disregard what  
18 Time Warner did. I just want you guys to know  
19 the caveats that are weighing in my mind when  
20 I make that decision. In other words I think  
21 I'm being very conservative and fair to  
22 Comcast when I incorporate Time Warner's

1 decision not to carry into my market

2 penetration test.

3 BY MR. SCHONMAN:

4 Q As an economist, do you have any  
5 expertise in why cable companies will shift a  
6 program from one tier to another? Are you the  
7 right person to ask about that?

8 A Well, I've written papers on  
9 vertical foreclosure theories. I've been  
10 involved in many carriage disputes.

11 I think what's going on, what  
12 explains the first exhibit in my direct  
13 testimony, is pure favoritism. In other words  
14 if you are an independent network, you are  
15 going to the outhouse, you are going to be  
16 relegated to the sports tier.

17 JUDGE SIPPEL: If you are what?

18 THE WITNESS: If you are an  
19 independent network. Remember, when we put up  
20 that exhibit that showed where Comcast puts  
21 its national sports network. And there was a  
22 lot of - and the line explained everything.



1 If you were affiliated you were above the  
2 line; you got on the expanded basic. If you  
3 were unaffiliated you were below the line.  
4 And there were the two exceptions, remember,  
5 ESPN and MASN.

6 BY MR. SCHONMAN:

7 Q Well, how many were above the  
8 line? Why don't we look at the exhibit. That  
9 might be easier.

10 JUDGE SIPPEL: What is the  
11 exhibit number?

12 MR. SCHONMAN: That's Enterprise  
13 Exhibit 191.

14 JUDGE SIPPEL: By the way, before  
15 - I'd like to - I take it you are moving in  
16 Comcast Exhibit 426.

17 MR. BURKE: That is correct.

18 JUDGE SIPPEL: Which is the Hal  
19 Singer article?

20 MR. BURKE: Yes, we are, Your  
21 Honor.

22 JUDGE SIPPEL: Any objection to

1     that, sir?

2             MR. SCHMIDT:  No, Your Honor.

3             JUDGE SIPPEL:  That is received  
4     into evidence, Comcast Exhibit No. 426 is  
5     received into evidence as Comcast Exhibit No.  
6     426.

7             (Whereupon the aforementioned  
8     document having bee previously  
9     marked for identification as  
10    Comcast No. 426 was received into  
11    evidence)

12            MR. SCHONMAN:  Dr. Singer, you  
13    have a poster which is Enterprise Exhibit No.  
14    191 in front of you.  And if I understand your  
15    testimony a moment ago you said that by and  
16    large independent programmers get relegated to  
17    a higher tier?

18            THE WITNESS:  National sports  
19    programmers, right.  And the theory that I'm  
20    offering is the notion that this decision is  
21    being driven by Comcast vertical integration  
22    into the same type of programming.  That is,

1 if you didn't see this vertical integration,  
2 you might not see the same pattern emerge.

3 BY MR. SCHONMAN:

4 Q But that is not a hard and fast  
5 rule, because as you indicated, there are  
6 exceptions.

7 A There are two exceptions on board  
8 with 15 odd observations. And they are  
9 important exceptions, but I think there are  
10 very plausible explanations for why.

11 Remember, the MASN example was a  
12 case that I was personally involved in. It  
13 was a discrimination case, that was resolved  
14 in favor of MASN.

15 Q But there were two exceptions not  
16 in a crowd of did you say 50, there are two  
17 exceptions in a crowd of six. In other words  
18 one-third of the independents are not on the  
19 premium sports tier; they are on the expanded  
20 basic tier. And you are counting MASN as one  
21 of those?

22 A Yes, and I just want to say that

1 without regulatory intervention by the FCC you  
2 would not see MASN there.

3 Q So we should disregard MASN?

4 A Well, I think it's a very  
5 important story. I think in fact the MASN  
6 story tells you exactly what's going on here.

7 Q Well, if we disregard MASN then we  
8 have two out of five, so now the percentage of  
9 independents above the line just went up, no?  
10 Is that - am I misreading?

11 A Well, you are counting ESPN and  
12 ESPN II as separate. But ESPN would bundle  
13 its programming when it negotiates with  
14 Comcast, so that decision was made all at  
15 once. So basically what you are seeing is  
16 that every - the point I was trying to make is  
17 that every - here are the statistics if you  
18 will. What percentage of Comcast-affiliated  
19 networks make it above the line? One hundred  
20 percent. And then what percentage of  
21 independent networks make it above the line?  
22 And I'd say it's one over 15, right? You

1 follow the math?

2 Q Yes.

3 A Those are the two takeaways.

4 Q This is just Comcast, correct?

5 Exhibit 191?

6 A Correct.

7 Q And this would vary from carrier

8 to carrier, and by carrier I mean a cable

9 company or - a cable company?

10 A A MVPD? Sure, so if we were

11 looking at - we already know that NFL Network

12 wouldn't appear below the line if we were

13 looking at DIRECTV, EchoStar, right, all the

14 Comcast in-region rivals, Verizon, AT&T; NFL

15 would be on a highly penetrative tier.

16 Q I had asked you earlier what are

17 the reasons from your experience why cable

18 companies will move a channel to a higher

19 tier, and you gave me one so far, because of

20 the vertical integration.

21 What other reasons are there?

22 A So let's take the case of a non-

1 vertically integrated firm, and so this is  
2 important way to distinguish this hypothetical  
3 from the conflict that causes us all to be in  
4 the room today.

5 Now I cannot say that the tiering  
6 decision by non-vertically integrated  
7 preferred (phonetic) was driven by, for  
8 reasons of affiliation, right? Now it's  
9 presumably because that is the profit  
10 maximizing choice of the MVPD.

11 Q In other words the cost?

12 A Well, in other words the - it's  
13 not just cost; it's a combination of cost and  
14 value, right? And what your in-region rivals  
15 are doing. We just went through this example  
16 where WOW didn't do it.

17 So I think that for a non-  
18 vertically integrated carrier you can make  
19 different inferences about why they would have  
20 tiered an independent network.

21 Q Is it your testimony, then, that  
22 for a non-vertically integrated entity, there

1 are multiple reasons why that type of entity  
2 might move a program to a different tier?

3 A Correct.

4 Q For a vertically integrated entity  
5 is it your testimony that price is the only  
6 criteria?

7 A No, in fact for a vertically  
8 integrated carrier, what I am concerned about,  
9 what the cable act is concerned about, what  
10 all this FCC body of regulations is concerned  
11 about, is that the decision is driven purely  
12 on the basis of affiliation.

13 Q So it is your testimony then that  
14 affiliation drives the determination for a  
15 vertically integrated entity as to where to  
16 place a particular program?

17 A Yes, with the caveat of a  
18 vertically integrated carrier who is pursuing  
19 an anticompetitive foreclosure strategy, yes.

20 Q So that presumes they are pursuing  
21 that strategy?

22 A Sure, we are trying to distinguish

1 between a pro-competitive hypothesis here and  
2 an anti-competitive hypothesis.

3 Q And I am trying to glean  
4 everything I can from your testimony, and I'm  
5 struggling with this. If you have a  
6 vertically integrated entity that is not  
7 pursuing that strategy, what are the reasons  
8 then why that type of entity might move a  
9 program from one tier to another?

10 A If we know that he is not pursuing  
11 the anti-competitive strategy.

12 Q Correct.

13 A Then the only other thing we have  
14 is that he is doing it for pro-competitive  
15 reasons, right? So presumably it's more  
16 profitable to him to put it on the tier.

17 Q How do we determine whether an  
18 entity has this strategy or doesn't have this  
19 strategy?

20 A We bring in an economist, and we  
21 look at the background too. The MASN case and  
22 this case have something very important that



1 I would like everyone to focus on, and what I  
2 have written on extensively, and what I've  
3 been involved in personally, a lot of cases.  
4 It starts off with a threat. It says, we want  
5 your content to put on our affiliated network,  
6 and if you don't give it to us, we are not  
7 going to carry your network any longer.

8 This is the factual backdrop of  
9 Time Warner CSET, for the Time Warner C-SET  
10 conflict in North Carolina. It was the  
11 factual backdrop of the Time Warner C-SET, by  
12 the way, Your Honor, is C dash S-e-t, and I  
13 write about it in my testimony.

14 It's the factual backdrop to the  
15 Time Warner MASN case, TCR v. Time Warner.  
16 It's the factual backdrop to Comcast-MASN.  
17 And it's the factual backdrop to NFL-Comcast.  
18 It all begins with this threat. We want your  
19 programming. We want an equity interest in  
20 the programming, which is directly in  
21 violation of the cable act's protections.

22 And if you don't take it, if you